



assistance of counsel. Respondents have filed their answer (docket #10) and petitioner has not filed a reply.

## II. Discussion

### A. Federal Habeas Standard

28 U.S.C. §2254(d), a provision of the Antiterrorism and Effective Death Penalty Act (AEDPA), provides the standards of review that this Court applies to the petition in this case:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §2254(d).

A state court decision is contrary to clearly established Supreme Court precedent, within the meaning of 28 U.S.C. §2254, “if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court’s] cases” or “if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [the Supreme Court’s] precedent.” *Lockyer v. Andrade*, 538 U.S. 63, 123 S.Ct. 1166, 1173, 155 L.Ed.2d 144 (2003) (*quoting Williams v. Taylor*, 529 U.S. 362, 405-06, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), and *citing Bell v. Cone*, 535 U.S. 685, 694, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002)).

A state court decision is an unreasonable application of clearly established Supreme Court precedent, within the meaning of 28 U.S.C. §2254(d), “if the state court identifies the correct governing legal principle from [the Supreme Court’s] decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Lockyer v. Andrade*, 538 U.S. at 74, 123 S.Ct. at 1174 (*quoting Williams*, 529 U.S. at 413, 120 S.Ct. 1495). The “unreasonable application” clause requires

1 the state court decision to be more than incorrect or erroneous; the state court's application of clearly  
2 established law must be objectively unreasonable. *Id.* (quoting *Williams*, 529 U.S. at 409, 120 S.Ct.  
3 1495).

4 In *Strickland v. Washington*, 466 U.S. 668 (1984), the Court established the standards by  
5 which claims of ineffective counsel are to be measured. In *Strickland*, the Court propounded a two-  
6 prong test; a petitioner claiming ineffective assistance of counsel must demonstrate (1) that the  
7 defense attorney's representation "fell below an objective standard of reasonableness," and (2) that  
8 the attorney's deficient performance prejudiced the defendant such that "there is a reasonable  
9 probability that, but for counsel's unprofessional errors, the result of the proceeding would have  
10 been different." *Strickland*, 466 U.S. at 688, 694. Counsel has a duty to make reasonable  
11 investigations or to make a reasonable decision that makes particular investigations unnecessary."  
12 *Strickland*, 466 U.S. at 691. More specifically, "a particular decision not to investigate must be  
13 directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference  
14 to counsel's judgments." *Id.*

15 Ground One

16 In his first claim for relief, petitioner argues his trial counsel was ineffective at sentencing  
17 when he make a false and incriminating statement that because the officer failed to follow the proper  
18 procedure, petitioner was frightened and had "taken action." Petitioner contends this incriminating  
19 statement resulted in the court's refusal to follow the negotiated sentence recommendation.

20 Ground Two

21 In his second ground for relief, petitioner claims counsel was ineffective for failing to  
22 investigate and present to the sentencing court facts that petitioner had to hit the officer because the  
23 officer deliberately chose not to follow the procedures and provoked the altercation. Plaintiff  
24 contends this failure resulted in the court not following the plea negotiations in imposing sentence.

25 Ground Three

26 Here petitioner claims counsel was ineffective by failing to mitigate the sentence through his  
27 failure to present at sentencing facts that petitioner also suffered injury on his face resulting from the  
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1 officer kicking and punching petitioner, which resulted in the harsher sentence.

2 On the appeal from denial of post-conviction relief, the Nevada Supreme Court addressed  
3 petitioner's claims as one, applying the proper standard of review, finding that petitioner has failed  
4 to demonstrate prejudice. The court stated:

5 Appellant failed to demonstrate that he was prejudiced. The district court  
6 stated at sentencing that it was imposing the sentence as pronounced  
7 because the instant case and the companion case that was part of the pled  
8 negotiations represented appellant's second and third felony offenses for  
9 battery by a prisoner. The district court emphasized that the violent  
10 activities appellant continued to engage in were prolonging his  
11 incarceration. Appellant failed to demonstrate there was a reasonable  
12 probability of a different outcome at sentencing had trial counsel provided  
13 different arguments at sentencing. Therefore, we conclude that the district  
14 court did not err in denying this claim.

15 Exhibit 40.<sup>1</sup>

16 The Nevada Supreme Court's decision as to all of petitioner's claims is a reasonable  
17 application of the *Strickland* standard and its findings of fact are supported by the record. *See*  
18 Exhibit 15. Petitioner appeared for sentencing in two separate criminal cases where he was charged  
19 and pled guilty, in both cases, to a category B felony of battery by a prisoner in lawful custody, a  
20 violation of NRS 200.481(2)(f). He was represented by different counsel on each of the charges and  
21 each counsel offered argument in mitigation. The court's decision in sentencing was clearly not  
22 related to counsel's presentation or his purportedly incriminating statements. The sentence was  
23 based upon petitioner's own violent propensity and his criminal activity. This court agrees that  
24 petitioner has failed to show any prejudice from counsel's performance as alleged in these three  
25 claims. No relief is warranted on petitioner's claims.

### 26 **III. Certificate of Appealability**

27 In order to proceed with an appeal of this decision, petitioner must receive a certificate of  
28 appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9<sup>th</sup> Cir. R. 22-1; *Allen v. Ornoski*, 435

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<sup>1</sup> The exhibits referenced in this order were provided by respondents in support of the answer  
and are found in the court's docket at number #10.

1 F.3d 946, 950-951 (9<sup>th</sup> Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir.  
2 2001). Generally, a petitioner must make “a substantial showing of the denial of a constitutional  
3 right” to warrant a certificate of appealability. *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529  
4 U.S. 473, 483-84 (2000). “The petitioner must demonstrate that reasonable jurists would find the  
5 district court’s assessment of the constitutional claims debatable or wrong.” *Id.* (*quoting Slack*, 529  
6 U.S. at 484). In order to meet this threshold inquiry, the petitioner has the burden of demonstrating  
7 that the issues are debatable among jurists of reason; that a court could resolve the issues differently;  
8 or that the questions are adequate to deserve encouragement to proceed further. *Id.*

9 Pursuant to the December 1, 2009 amendment to Rule 11 of the Rules Governing Section  
10 2254 and 2255 Cases, district courts are required to rule on the certificate of appealability in the  
11 order disposing of a proceeding adversely to the petitioner or movant, rather than waiting for a  
12 notice of appeal and request for certificate of appealability to be filed. Rule 11(a). This Court has  
13 considered the issues raised by petitioner, with respect to whether they satisfy the standard for  
14 issuance of a certificate of appealability, and determines that none meet that standard. The Court  
15 will therefore deny petitioner a certificate of appealability.

#### 16 **IV. Conclusion**

17 Petitioner has not met his burden to show that the Nevada Supreme Court’s decisions on his  
18 claims were contrary to or involved an unreasonable application of clearly established federal law or  
19 that its factual findings were unreasonable in light of the evidence it was presented. Petitioner is not  
20 entitled to relief on any of his claims from this court and the petition shall be denied.

21 **IT IS THEREFORE ORDERED** that the Petition for Writ of Habeas Corpus (docket #4) is  
22 **DENIED.**

23 **IT IS FURTHER ORDERED** that a Certificate of Appealability is **DENIED.** The Clerk  
24 shall enter judgment accordingly.

25 DATED this 21st day of September, 2010.



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LARRY R. HICKS  
UNITED STATES DISTRICT JUDGE